tion of her First Amendment rights, Caron had to show, among other things,[1] that her speech addressed a matter of public concern and not merely her personal interests or internal office grievances. See *Connick v. Myers*, 461 U.S. 138, 146-147 [1 IER Cases 178] (1983); *Smith v. Commissioner of Mental Retardation*, 409 Mass. 545, 552 (1991). The question whether particular speech touches upon a matter of public concern is one of law and must be answered in each case on the basis of the "content, form, and context" of the speech as revealed by the whole record. *Connick v. Myers*, 461 U.S. at 147-148. The reported cases form a spectrum falling on both sides of the line. For example, compare *Jett v. Dallas Indep. Sch. Dist.*, 798 F.2d 748, 757-758 [41 FEP Cases 1076] (5th Cir. 1986); *Belk v. Minocqua*, 858 F.2d 1258, 1263-1264 [3 IER Cases 1489] (7th Cir. 1988); *Boger v. Wayne County*, 950 F.2d 316, 322-323 [57 FEP Cases 732] (6th Cir. 1991), with *Zaky v. United States Veterans Admn.*, 793 F.2d 832, 838-839 (7th Cir. 1986); *Koch v. Hutchinson*, 847 F.2d 1436, 1443-1449 (10th Cir. 1988); *Vukadinovich v. Bartels*, 853 F.2d 1387, 1391 (7th Cir. 1988).

[1] It is clear from the affidavits filed by all parties that for some time before her television appearances Caron had felt aggrieved by her treatment as a smoker in her particular workplace. The rights of smokers in the department's Attleboro office had been the subject of litigation, and Caron had intervened as a party. Subsequently, the department instituted a statewide policy concerning smoking which restricted her rights. Caron stated in her affidavit that she "complained to anyone who would listen" about the office policy, that she "became increasingly vocal about [her] treatment as a smoker," and that she began "to attract media notoriety." She stated, further, that in June of 1987, "60 Minutes" became interested in doing a feature on her, and she appeared on the program. In the fall of 1987, according to her affidavit, she was "invited to appear on two Boston television talk programs on smokers' rights."

The affidavits informed the motion judge adequately of the context of Caron's speech. Caron's televised remarks were made in the context of a long-standing internal office dispute. As to the content of the speech, Caron stated only that she was "invited" to appear on television programs "on smokers' rights."

Some knowledge of content is important in determining whether a person's speech relates to a matter of public concern. It would not have been enough that Caron's comments related to the department, an important public agency, as there is no indication that the comments suggested that the agency was not properly performing its responsibilities to the public, compare *Roth v. Veteran's Admn.*, 856 F.2d 1401, 1406 (9th Cir. 1988), or that the agency was deficient in a matter about which the public might be concerned, such as engaging in a pattern of unlawful discrimination, compare *Matulin v. Village of Lodi*, 862 F.2d 609, 612-613 (6th Cir. 1988). On the other hand, the issue of smoking in public places has been the subject of legislation in Massachusetts, see G. L. c. 270, §§21 and 22, and there certainly has been considerable public debate about the dangers of smoking both to smokers and others in their immediate vicinity and the extent to which smoking should be tolerated in public places. Caron would not be disqualified from First Amendment protection merely because she had a personal stake in the controversy. The question is whether her television appearances were related to both her personal concerns and the broader issue of smoking policies in general.

We think her statement that she was "invited" to appear on programs "on smokers' rights," particularly in light of the form of those appearances, is sufficient to create an inference that she was addressing more than her own personal concerns. As to the form in which Caron expressed herself, we think it significant that she was solicited on three separate occasions by producers of television programs, one a well-known national program which presents issues of interest to the public. The invitations were all made in connection with the issue of the rights of smokers in the workplace. It seems most unlikely that her repeated appearances on such television programs would have been related exclusively to her personal grievances. See *Rode v. Dellarciprete*, 845 F.2d 1195, 1202 (3d Cir. 1988); *Moore v. Kilgore*, 877 F.2d 364, 371-372 [4 IER Cases 1174] (5th Cir. 1989); *Broderick v. Roache*, 767

[1] If the speech is determined to address a matter of public concern, two issues would remain: whether the interests of the employee in making the statement outweigh the State's interest as employer in promoting efficient performance of its employees, *Pickering v. Board of Educ.*, 391 U.S. 563, 568 [1 IER Cases 8] (1968); and whether the employee's speech was a substantial factor motivating the defendants to effectuate her discharge, *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 [1 IER Cases 76] (1977).

F.Supp. 20, 24-25 (D.Mass. 1991).[1] This is so even though we recognize that the fact that Caron's views, or her situation, happened to attract media attention may not be enough by itself to qualify her remarks as expressions on a matter of public interest. See *Connick v. Myers*, 461 U.S. at 160 n.2 (Brennan, J., dissenting); *Vukadinovich v. Bartels*, 853 F.2d at 1391; *Koch v. Hutchinson*, 847 F.2d at 1448.

[2] The question remains whether the defendants are immune from suit. The right of public employees not to be fired in retaliation for speaking on matters of public concern has been established since at least 1968, see *Pickering v. Board of Educ.*, 391 U.S. 563, 568 [1 IER Cases 8] (1968), and was affirmed in *Connick v. Myers*, 461 U.S. at 154, in 1983. Contrast *Duarte v. Healy*, 405 Mass. at 49, in which the rights of probationary fire fighter recruits with respect to a drug testing policy were held to be *not* clearly established. Considering the record as a whole, particularly the form in which Caron expressed herself, we conclude that, at least for purposes of summary judgment, it was "clearly established" that Caron's expression had sufficiently addressed a public issue to entitle her to First Amendment protection. Accordingly, the judgments entered on the four counts of the complaint alleging violations of the State and Federal Civil Rights statutes (counts 2, 3, 4, and 5) are vacated, and the case is remanded to the Superior Court for further proceedings on the remaining issues in the case.

So ordered

Concurring Opinion

BROWN, Judge, (concurring): — Although I fully agree with the careful and sound treatment of this matter by the majority, I believe that the same result could be reached more directly. I am of the opinion that the plaintiff's affidavit, cited by the majority in note 6 at ——, is sufficient to raise an issue of material fact as to whether the alleged actions of the defendants and certain of their colleagues (e.g., another supervisor) were threatening and were intended to intimidate or coerce the plaintiff to refrain from exercising her rights to free speech under the Federal and State Constitutions. See *Batchelder v. Allied Stores Corp.*, 393 Mass. 819, 821, 822-23 (1985). This most certainly is a jury question at this stage of the proceedings.

The plaintiff must be afforded the opportunity to establish that the remarks attributed to the defendants were substantially accurate, and that their clear implications accurately reflected their state of mind. The granting of summary judgment in such cases "is favored." *Pederson v. Time, Inc.*, 404 Mass. 14, 17 (1989). *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 809 [6 IER Cases 1530] (1991).

The abuse of power by public officials over their subordinates—whether by intimidation and coercion either to engage in improper conduct or, as alleged here, to refrain from exercising rights—must be extirpated. It is in this area that the courts, which are often the final forum to which victims of such abuse can turn, must act with particular care to find the truth. No conduct strikes me as being more coercive than for a governmental official, one vested with the public trust, to exercise his powers in the abusive manner here alleged. This would seem to be particularly egregious in this context where it was intended to chill the free speech rights of a subordinate.

[1] Caron stated in her affidavit that before she appeared on "60 Minutes" she was told by a supervisor, not one of the two defendants involved in this appeal: "The Commissioner will be very unhappy if you do this segment on '60 Minutes.' He has a long memory." Caron makes similar but vague references in her affidavit to threats by the defendants. She states: "When the defendants discovered that I was to appear on these [Boston television] programs, attempts were made to keep me off them by denying me time away from my job, to which I was entitled, and for which, in one instance, I had received prior written approval." Compare *Kolodziej v. Smith*, 412 Mass. (1992).

RIDDLE v. AMPEX CORP.

Colorado Court of Appeals

RIDDLE v. AMPEX CORPORATION, et al., No. 91CA1058, March 19, 1992

SMOKING

1. Safe workplace — Smoking ban — Work-related stress — Workers' compensation claim ▸220.09

Employee failed to prove that she was eligible for workers' compensation following her resignation because of alleged work-related stress after employer restricted workplace smoking; work-related stress disabilities are not compensable if they are based on "facts and circumstances that are

common to all fields of employment" and that are "not unique to [claimant's] employment," and smoking restrictions are common in today's workplace.

2. Retaliation ▸425.0301

Employee who was heavy smoker and who resigned because of alleged work-related stress after employer restricted smoking in workplace failed to prove that employer retaliated against her because of her opposition to smoking restriction; evidence supports findings of administrative law judge who heard her workers' compensation appeal that employee's evidence of retaliation and harassment was insufficient.

Review of an Order from the Colorado Industrial Claim Appeals Office. Affirmed.

Richard E. Falcone, Colorado Springs, Colo., for petitioner.

Raymond F. Callahan (Anderson, Campbell and Laugesen, P.C.), Denver, Colo., for respondents Ampex Corporation and National Union Fire Insurance Company.

Gale A. Norton, Attorney General, Raymond T. Slaughter, Chief Deputy Attorney General, Timothy M. Tymkovich, Solicitor General, and Michael P. Serruto, Assistant Attorney General, Denver, Colo., for respondent Industrial Claim Appeals Office.

Full Text of Opinion

PIERCE, Judge: — Sharon Kay Riddle, claimant, contests an order of the Industrial Claim Appeals Panel denying and dismissing her claim for stress-related disability. We affirm.

The claimant alleges that she was rendered totally and temporarily disabled by mental stress caused by the implementation of a no-smoking ban in the electronics manufacturing plant of the employer, Ampex Corporation.

In 1986, Ampex instituted a smoking restriction which confined tobacco smoking to the employees' cafeteria. A representative of the employer testified that the restriction was imposed in response to complaints from nonsmoking employees, as well as the company's recognition of state and local initiatives underway at that time to impose smoking restrictions in public places, including in the workplace.

Despite the smoking restriction, tobacco smoke and associated by-products continued to circulate through the manufacturing plant's air duct system. In 1987, air-borne particulates and toxins were detected in the company's research and development laboratory, an occurrence that the company feared could potentially affect its efforts to develop a new, high tech product.

In addition, the employer's representative testified that complaints from non-smoking employees had "probably doubled" after the smoking restriction was implemented because tobacco smoke was now intensified and increased in the cafeteria.

Consequently, in April 1988, the employer adopted a smoking ban which prohibited tobacco smoking inside the plant building, but allowed smoking on outside premises. The company attempted to mitigate the impact on employees who smoked by giving advance written notice of both the 1986 and the 1988 smoking-restriction policies. In addition, the company on two separate occasions sponsored a smoking cessation program and offered to pay the costs of the program for those employees who successfully completed the course.

In July 1988, the claimant took leave from employment, and in October 1988, she resigned because of alleged work stress. Claimant, a 1-2 pack per day, 24-year cigarette smoker, was diagnosed as suffering from major depression, nicotine dependence, and post-traumatic stress disorder. The physicians and psychologists who examined the claimant agreed that her condition was probably precipitated by the workplace smoking restriction, but they generally felt the severity of her condition was attributable to underlying non-occupational factors.

The Administrative Law Judge (ALJ) found that claimant had established three of the four statutory requisites for workers' compensation liability set forth in §8-52-102(2), C.R.S. (1988 Repl. Vol. 3B) (subsequently amended and now codified at §8-41-301(2), C.R.S. (1991 Cum. Supp.)).

However, the ALJ found that smoking restrictions are common in today's workplace. The ALJ concluded that claimant failed to satisfy §8-52-102(2)(c), C.R.S. (1988 Repl. Vol. 3B) (now codified at §8-41-301(2)(c), C.R.S. (1991 Cum. Supp.)), which provides that work-related stress disabilities are not compensable if they are based "in whole or in part, upon facts and circumstances that are common to all fields of employment" and that "the facts and circumstances" were "not unique to [claimant's] employment."

In addition, the ALJ found no persuasive evidence that the employer had retaliated against the claimant because of her opposition to the smoking ban, as the claimant had alleged.

The ALJ's order denying and dismissing the claim was affirmed by the Industrial Claim Appeals Panel.

I.

[1] Claimant disputes the ALJ's finding that smoking restrictions are common in today's workplace. The claimant makes a distinction between work sites which have designated smoking areas and work sites which have total smoking bans and asserts that "total smoking bans" are not common to all fields of employment. We reject this contention.

It is undisputed that Ampex freely permitted its employees to smoke on the company premises, outside the plant building. Therefore, we reject the claimant's characterization of the restriction as a "total smoking ban." Further, there was abundant evidence from many of the witnesses, including the claimant herself and her treating physician, that smoking restrictions are a common fact in today's life, not only in the workplace but in social and commercial environments as well.

In *Holme, Roberts & Owen v. Industrial Claim Appeals Office*, 800 P.2d 1332 (Colo. App. 1990), this court ruled that work conditions which are objectively common to all fields of employment might nevertheless be uncommon under the particular facts and circumstances of a given case. Thus, while performance evaluations and disciplinary actions are common to all fields of employment, discipline which is arbitrary, unreasonable, or taken in bad faith is not common to all fields of employment.

The foregoing evidence was sufficient to establish that smoking restrictions are common in today's workplace and that the particular restriction at issue here was not imposed in a manner that was arbitrary, unreasonable, or in bad faith.

II.

[2] Claimant, however, asserts that the ALJ gave inadequate consideration to her testimony that she suffered harassment and retaliation from the employer because of her opposition to the smoking restriction. She further contends that the ALJ imposed an undue burden of proof under §8-52-102(2)(c) and failed to make sufficient factual findings reflecting the basis of his decision. We reject these contentions.

Claimant presented no corroborative evidence in support of her allegations of retaliatory action, and the ALJ found her account to be unpersuasive. We are bound by the ALJ's resolution of the credibility issue. Section 8-43-308, C.R.S. (1991 Cum. Supp.); *Varsity Contractors v. Baca*, 709 P.2d 55 (Colo. App. 1985).

In addition, the ALJ is required to make specific findings only as to the evidence which is deemed persuasive and determinative. *Roe v. Industrial Commission*, 734 P.2d 138 (Colo. App. 1986). There is no obligation to address every issue raised or evidence which is unpersuasive, *Crandall v. Watson-Wilson Transportation System, Inc.*, 171 Colo. 329, 467 P.2d 48 (1970); nor is the ALJ held to a crystalline standard in articulating the administrative order. *See George v. Industrial Commission*, 720 P.2d 624 (Colo. App. 1986).

Here, the ALJ made detailed factual findings regarding the facts and circumstances pertinent to the claimant's alleged stressors and the conflicting inferences from the medical evidence on causation. In addition, the order contains a verbatim copy of the applicable statute, indicating the ALJ's awareness of the correct evidentiary burden.

Reviewing the order in its entirety, together with the evidence and the reasonable inferences therefrom, we are satisfied that the claim was properly dismissed. *See Eisnach v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981).

The order is affirmed.

Judge TURSI and Judge REED concur.

PLATT v. JACK COOPER TRANSPORT CO.

U.S. Court of Appeals, Eighth Circuit (St. Louis)

PLATT v. JACK COOPER TRANSPORT CO., INC., Nos. 90-2917 and 91-2038, March 16, 1992

PRE-EMPTION

1. State-law claims — Safety complaints — Retaliation ▸425.0313 ▸505.09 ▸500.03

National Labor Relations Board's exclusive jurisdiction over unfair labor practices pre-empts state-law